

Honorable Richard A. Jones
Honorable Brian A. Tsuchida

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID G. OPPENHEIMER,

Plaintiff,

vs.

EXP REALTY, LLC,

Defendant.

No. 2:21-cv-01304-RAJ-BAT

ANSWER OF EXP REALTY, LLC TO
FIRST AMENDED COMPLAINT AND
JURY DEMAND

COMES NOW Defendant eXp Realty, LLC (“eXp”), by and through its attorneys of record, Donna M. Chamberlin and Chuqiao Wang of Lewis Brisbois Bisgaard & Smith, LLP, and in answer to Plaintiff David G. Oppenheimer (“Oppenheimer”)’s First Amended Complaint and Jury Demand, admits, denies, and alleges as follows¹:

NATURE OF THE ACTION

1. Defendant eXp admits that Plaintiff Oppenheimer has alleged certain claims under the United States Copyright Act and the Digital Millennium Copyright Act, but denies the remaining allegations in paragraph 1.

¹ Defendant does not respond to the headings in the Amended Complaint, which require no response. To the extent that these headings purport to contain factual allegations requiring a response, Defendant denies them.

THE PARTIES

2. eXp admits that Plaintiff David Oppenheimer is an individual, but lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 2 and, on that basis, denies them.

3. eXp admits that it is a Washington limited liability company with an office to do business in Whatcom County, Washington. eXp admits that it uses a website accessible at “exprealty.com,” denies that it has exclusive control over all aspects of content thereon, and lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 3 and, on that basis, denies them.

JURISDICTION AND VENUE

4. eXp admits the allegations in paragraph 4.

5. eXp admits that it has contacts within this District and that it is a domestic entity formed in the State of Washington, but denies that its principal place of business is in Washington for all purposes. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 5 and, on that basis, denies them.

6. eXp denies that venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(a).

FACTUAL ALLEGATIONS

7. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7 and, on that basis, denies them.

8. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 8 and, on that basis, denies them.

9. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 9 and, on that basis, denies them.

1 10. eXp lacks knowledge or information sufficient to form a belief as to the truth or
2 falsity of the allegations in paragraph 10 and, on that basis, denies them.

3 11. eXp admits that it is a company that serves as a real estate brokerage and that its
4 services can be accessed at exprealty.com. eXp lacks knowledge or information sufficient to
5 form a belief as to the truth or falsity of the remaining allegations in paragraph 11 and, on that
6 basis, denies them.
7

8 **Oppenheimer Creates, Registers, and Publishes the Photograph**

9 12. eXp lacks knowledge or information sufficient to form a belief as to the truth or
10 falsity of the allegations in paragraph 12 and, on that basis, denies them.

11 13. eXp lacks knowledge or information sufficient to form a belief as to the truth or
12 falsity of the allegations in paragraph 13 and, on that basis, denies them.
13

14 14. eXp lacks knowledge or information sufficient to form a belief as to the truth or
15 falsity of the allegations in paragraph 14 and, on that basis, denies them.

16 15. eXp lacks knowledge or information sufficient to form a belief as to the truth or
17 falsity of the allegations in paragraph 15 and, on that basis, denies them.

18 16. eXp lacks knowledge or information sufficient to form a belief as to the truth or
19 falsity of the allegations in paragraph 16 and, on that basis, denies them.
20

21 17. eXp lacks knowledge or information sufficient to form a belief as to the truth or
22 falsity of the allegations in paragraph 17 and, on that basis, denies them.

23 **Initial Use of the Photograph by Defendant's Agent Without Authorization**

24 18. eXp admits that Robert A. Ombres ("Ombres") was an independently contracted
25 real estate representative affiliated with eXp Realty at various times in North Carolina. eXp
26 lacks knowledge or information sufficient to form a belief as to the truth or falsity of the
27 remaining allegations in paragraph 18 and, on that basis, denies them.

1 19. eXp admits that Ombres was an eXp Realty real estate agent in North Carolina
2 associated with eXp as an independent contractor at various times. eXp lacks knowledge or
3 information sufficient to form a belief as to the truth or falsity of the remaining allegations in
4 paragraph 19 and, on that basis, denies them.

5 20. eXp lacks knowledge or information sufficient to form a belief as to the truth or
6 falsity of the allegations in paragraph 20 and, on that basis, denies them.

7 21. eXp lacks knowledge or information sufficient to form a belief as to the truth or
8 falsity of the allegations in paragraph 21 and, on that basis, denies them.

9 22. eXp lacks knowledge or information sufficient to form a belief as to the truth or
10 falsity of the allegations in paragraph 22 and, on that basis, denies them.

11 23. eXp lacks knowledge or information sufficient to form a belief as to the truth or
12 falsity of the allegations in paragraph 23 and, on that basis, denies them.

13 24. eXp lacks knowledge or information sufficient to form a belief as to the truth or
14 falsity of the allegations in paragraph 24 and, on that basis, denies them.

15 **Oppenheimer Provides Notice of Copyright Infringement to Defendant**

16 25. eXp lacks knowledge or information sufficient to form a belief as to the truth or
17 falsity of the allegations in paragraph 25 and, on that basis, denies them.

18 26. eXp admits that it received a letter from Oppenheimer's former counsel in 2021,
19 the content of which speaks for itself. eXp lacks knowledge or information sufficient to form a
20 belief as to the truth or falsity of the remaining allegations in paragraph 26 and, on that basis,
21 denies them.

22 27. eXp admits that it is the DMCA Designated Agent for the website at
23 exprealty.com. eXp lacks knowledge or information sufficient to form a belief as to the truth or
24 falsity of the remaining allegations in paragraph 27 and, on that basis, denies them.

Defendant Fails to Remove or Disable Access to the Photograph Expeditiously

28. eXp admits that its former attorney exchanged correspondence with Oppenheimer's counsel in 2021, that exhibit L of the Amended Complaint is a true and accurate copy of one letter from eXp's counsel to Oppenheimer's counsel in 2021, and that the content of that letter (exhibit L) speaks for itself. To the extent further answer could be required, eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 28 and, on that basis, denies them.

29. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 29 and, on that basis, denies them.

30. eXp admits that its former counsel received correspondence from Oppenheimer's counsel on or around August 2021, the content of which speaks for itself. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 30 and, on that basis, denies them.

31. eXp admits that it exchanged correspondence with Oppenheimer's counsel in 2021 and that exhibit O of the Amended Complaint is a true and accurate copy of one letter from eXp's counsel to Oppenheimer's counsel in 2021. eXp denies the remaining allegations in paragraph 31.

32. eXp denies that Oppenheimer's image remained "accessible." eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 32 and, on that basis, denies them.

EXP's Ongoing and New Infringements After Oppenheimer's Initiation of Litigation

33. eXp denies that Oppenheimer's Photograph remained "accessible." eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 33 and, on that basis, denies them.

1 34. eXp lacks knowledge or information sufficient to form a belief as to the truth or
2 falsity of the allegations in paragraph 34 and, on that basis, denies them.

3 35. eXp lacks knowledge or information sufficient to form a belief as to the truth or
4 falsity of the allegations in paragraph 35 and, on that basis, denies them.

5 36. eXp lacks knowledge or information sufficient to form a belief as to the truth or
6 falsity of the allegations in paragraph 36 and, on that basis, denies them.

7 37. eXp lacks knowledge or information sufficient to form a belief as to the truth or
8 falsity of the allegations in paragraph 37 and, on that basis, denies them.

9 38. eXp admits that Karuna C. Rockwell has worked as an independent contracted
10 real estate representative affiliated with eXp Realty in North Carolina at various times. The
11 contents of the NCREC posting speak for itself. eXp lacks knowledge or information sufficient
12 to form a belief as to the truth or falsity of the remaining allegations in paragraph 38 and, on that
13 basis, denies them.
14
15

16 **FIRST CLAIM FOR RELIEF**
17 **Copyright Infringement Under 17 U.S.C. § 501**

18 39. In answer to paragraph 39 of the Amended Complaint, eXp repeats and realleges
19 its answers to each preceding paragraph as though fully set forth herein.

20 40. eXp lacks knowledge or information sufficient to form a belief as to the truth or
21 falsity of the allegations in paragraph 40 and, on that basis, denies them.

22 41. On information and belief, eXp admits that Ombres is a licensed real estate agent
23 in North Carolina. eXp denies that Ombres is its agent for all purposes including for the matters
24 alleged herein. eXp lacks knowledge or information sufficient to form a belief as to the truth or
25 falsity of the remaining allegations in paragraph 41 and, on that basis, denies them.

26 42. Deny.
27

1 43. On information and belief, eXp admits that Rockwell is a licensed real estate
2 agent in North Carolina. eXp denies that Rockwell is its agent for all purposes including the
3 matters alleged herein. eXp lacks knowledge or information sufficient to form a belief as to the
4 truth or falsity of the remaining allegations in paragraph 43 and, on that basis, denies them.

5 44. Deny.

6 45. Deny.

7 46. Deny.

8 47. Deny.

9 48. Deny.

10 49. Deny.

11 50. Deny.

12 51. Deny.

13 52. Deny.

14 53. Deny.

15 54. Deny.

16 **SECOND CLAIM FOR RELIEF**
17 **Vicarious Copyright Infringement**
18 **(In the Alternative)**

19 55. In answer to paragraph 55 of the Amended Complaint, eXp repeats and realleges
20 its answers to each preceding paragraph as though fully set forth herein.

21 56. Deny.

22 57. Deny.

23 58. Deny.

24 59. Deny.

THIRD CLAIM FOR RELIEF
Contributory Copyright Infringement
(In the Alternative)

60. In answer to paragraph 60 of the Amended Complaint, eXp repeats and realleges its answers to each preceding paragraph as though fully set forth herein.

61. Deny.

62. Deny.

63. Deny.

64. Deny.

FOURTH CLAIM FOR RELIEF
Violations of the DMCA Under Sections 1202(a) and 1202(b) of the Copyright Act

65. In answer to paragraph 65 of the Amended Complaint, eXp repeats and realleges its answers to each preceding paragraph as though fully set forth herein.

66. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 66 and, on that basis, denies them.

67. Deny.

68. eXp lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 68 and, on that basis, denies them.

69. Deny.

70. Deny.

71. Deny.

72. Deny.

73. Deny.

74. Deny.

75. Deny.

1 76. Deny.

2 77. Deny.

3 78. Deny.

4 79. Deny.

5 **JURY DEMAND**

6
7 Oppenheimer's request for a jury requires no answer. To the extent that a trial may be
8 appropriate, eXp has no objection to it.

9 **PRAYER FOR RELIEF**

10 eXp denies that Oppenheimer is or could be entitled to any relief he seeks in paragraphs
11 1-5.

12 **OMNIBUS DENIAL**

13 Unless expressly admitted herein, eXp denies the remainder of Oppenheimer's Amended
14 Complaint.
15

16 **GENERAL AND AFFIRMATIVE DEFENSES**

17 By way of further answer and by way of general and affirmative defense, eXp alleges and
18 states as follows:

19 1. The Amended Complaint fails to state a claim upon which relief can be granted,
20 or Plaintiff cannot establish the elements of proof for direct, secondary, contributory, and
21 vicarious infringement and Plaintiff also fails to state a valid claim, or Plaintiff cannot establish
22 all elements, of a violation of the DMCRA.

23 2. The case is subject to dismissal for improper venue because the parties and the
24 alleged acts are centered in North Carolina.

25 3. On information and belief and subject to further investigation in discovery,
26 Oppenheimer's claims are or may be barred in whole or in part to the extent that Oppenheimer
27

1 lacks standing, including because Oppenheimer may have assigned and/or waived any rights he
2 may have had to the alleged copyrighted photograph to a third party including by, *inter alia*,

3 a. Allowing others to use his work free of charge and without enforcement of
4 his alleged copyrights;

5 b. Dedicating his work to the public by posting images of it without notice of
6 copyright protection;

7 c. Allowing other putative infringers to use his work free of charge;

8 d. Failing to monitor and detect putative uses of his works;

9 e. Posting his work in a fashion in which it was reasonably expected that
10 others would use it without understanding it was subject to purchase or use.
11

12 4. Oppenheimer's claims are barred by the statute of repose and/or estoppel to the
13 extent that Oppenheimer unnecessarily delayed in asserting his putative rights and in so doing,
14 slept on his rights for the purpose of having eXp abstain from addressing the alleged
15 infringement, and but for Oppenheimer's inducement, eXp could have acted to prevent any
16 claims of infringement, and Oppenheimer knew that his delays were for the purpose of
17 generating false or induced claims of infringement or willful infringement.
18

19 5. On information and belief and subject to further investigation in discovery,
20 Oppenheimer's claims are or may be barred in whole or in part to the extent that he was not the
21 owner of any exclusive right under 17 U.S.C. § 106 at the time of the alleged infringement, or
22 the work was not subject to copyright due to lack of sufficient creativity or derivation from other
23 works.
24

25 6. On information and belief and subject to further investigation in discovery,
26 Oppenheimer's claims are or may be barred in whole or in part to the extent that he does not own
27 validly registered copyrights for the photographs at issue, including because Oppenheimer may

1 have: (a) failed to comply with statutory and regulatory formalities for securing a registration for
2 the work, (b) abandoned, waived rights in, or dedicated the work to the public, or (c) perpetuated
3 a fraud on the Copyright Office or otherwise violated public policy in securing or asserting rights
4 to the work which is not subject to valid copyright protection.

5 7. Upon information and belief, and subject to further investigation in discovery,
6 Oppenheimer's claims are or may be barred in whole or in part to the extent that the registrations
7 allegedly covering the photograph at issue are invalid and/or unenforceable because, among
8 other things, the at-issue work: (a) constitutes a *scenes a faire* image that is not subject to
9 protection, (b) merges the idea and facts; thus, lacks sufficient originality to be subject to
10 copyright, (c) lacks sufficient creativity to be subject to copyright protection, (d) was dedicated
11 to the public, (e) is the result of copying, and further (f) Oppenheimer may have failed to comply
12 with registration, deposit, and other necessary formalities under the Copyright Act.
13
14

15 8. On information and belief, and subject to further investigation in discovery,
16 Oppenheimer's claims are barred due to the doctrine of unclean hands in securing his copyright
17 registration, asserting his rights, and by warehousing his work knowing it had limited if any
18 actual value.

19 9. Any actions allegedly performed by eXp were not willful and were innocent and
20 are therefore not subject to any claim under 17 U.S.C. § 504, 1202.
21

22 10. Oppenheimer's claimed work lacks demonstrable commercial value; thus,
23 Oppenheimer cannot claim actual damages and any statutory damages should be denied or
24 reduced.

25 11. Oppenheimer's claims are barred to the extent that any use of the Photograph is
26 fair use.
27

1 12. eXp exercised good faith efforts to prevent any use or infringing use of
2 Oppenheimer's work, such that there could be no direct, contributory, vicarious or secondary
3 infringement by eXp.

4 13. eXp lacked knowledge of any infringing acts by either Ombres and Rockwell and
5 took good faith efforts to train them and to prevent any allegedly infringing act.

6 14. eXp made no material contribution to the allegedly infringing acts and instead
7 trained and directed its independent agents not to use and to protect against using copyrighted
8 works.

9 15. Ombres and Rockwell were independent contractors from whose acts eXp derived
10 no commercial benefit.

11 16. Plaintiff cannot state a claim under the DMCRA, 17 U.S.C. § 512 (b) to the extent
12 that any alleged use of the work was by reason of intermediate and temporary storage including
13 by that of a third party, kvCore, and eXp took expeditious actions to remove, disable and make
14 the work inaccessible through kvCore, any eXp webpage or any other means.

15 17. Plaintiff cannot state a claim under the DMCRA, 17 U.S.C. § 512 (c) or, if a
16 claim could be stated, it is limited because:

17 a. Plaintiff failed to provide eXp with adequate notice of the alleged
18 infringement in that it failed to have all required elements of notification of infringing
19 activities pursuant to 17 U.S.C. § 512 (c);

20 b. Plaintiff failed to give timely notice of the alleged infringement;

21 c. Plaintiff failed to take reasonable actions to notify the website operator,
22 kvCore, who had the right and ability to control the at-issue website;

23 18. eXp is subject to safe harbor protection under the DMCRA, 17 U.S.C. § 512 (c),
24 (d), because, *inter alia*:
25
26
27

1 a. eXp trained its personnel to prevent use of copyrighted works and other
2 intellectual property;

3 b. eXp had a DMCA compliance process in place for providing complainants
4 an opportunity to give notice and request the takedown of any offending works;

5 c. eXp did not derive a financial benefit from any alleged infringing activity
6 and lacked the ability to control the alleged infringing activity;

7 d. eXp did not have actual knowledge that the alleged work was copyright
8 protected or posted on any eXp work or advertising material, and was not aware of facts
9 or circumstances from which infringing activity was apparent;

10 e. To the extent of any alleged infringement, eXp acted expeditiously to
11 remove or disable use or access to Oppenheimer's alleged work and did so in good faith;
12 and
13

14 f. The website was operated by a third party, kvCore, over whom eXp lacked
15 control and to whom Plaintiff failed to provide statutory notice of the alleged
16 infringement.
17

18 **DEFENDANT'S PRAYER FOR RELIEF**

19 WHEREFORE having fully answered Oppenheimer's Amended Complaint, eXp requests
20 relief as follows:
21

22 1. Dismissal of Oppenheimer's Amended Complaint with prejudice with no finding
23 of liability as against eXp;

24 2. Dismissal of this action based upon improper venue;

25 3. An award of attorneys' fees and costs to eXp to the extent allowed by law; and

26 4. For such further and other relief as this Court deems just and equitable.
27

1 DATED this 14th day of February, 2023

2 LEWIS BRISBOIS BISGAARD & SMITH LLP

3 /s/ Donna M. Chamberlin

4 Donna M. Chamberlin, WSBA #31227

5 /s/ Chuqiao Wang

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12 Attorneys for Defendant

DECLARATION OF SERVICE

I hereby certify that on the 14th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

<p>Nathan A. Hoerschelmann, WSBA #33592 HOERSCHELMANN DIETZ PLLC 1143 Martin Luther King Jr. Way, #145 Seattle, WA 98122 (206) 953-8735</p> <p>Ilya G. Zlatkin (<i>pro hac vice</i>) ZLATKIN WONG LLP 4245 North Knox Avenue Chicago, IL 60641 (312) 809-6989</p> <p><i>Attorneys for Plaintiff</i></p>	<p><input type="checkbox"/> via U.S. Mail, first class, postage prepaid</p> <p><input type="checkbox"/> via FedEx Overnight service</p> <p><input type="checkbox"/> via Legal Messenger Hand Delivery</p> <p><input checked="" type="checkbox"/> via CM/ECF</p> <p><input checked="" type="checkbox"/> via E-mail: nathan@hdpnw.com ilya@zlatkinwong.com faye@zlatkinwong.com</p>
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/s/ Annie Kliemann

Annie Kliemann, Legal Secretary

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